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IN THE

Supreme Court of the United States

NO. 73-843, OCTOBER TERM, 1973

LYKES BROS. STEAMSHIP CO., INC., *Petitioner*

v.

M. F. BROWN, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

BRIEF OF THE RESPONDENT, M. F. BROWN

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Respondent prays that no Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit and that said opinion be in all things affirmed.

REPLY POINTS

REPLY POINT I.

In answer to QUESTION PRESENTED NUMBER ONE OF PETITIONER Respondent says that the Trial Court did not find a "near violation" but found an actual violation of the Safety and Health Regulations for Longshoring.

REPLY POINT II.

In answer QUESTION PRESENTED NUMBER TWO OF PETITIONER, the Respondent says that the Trial Court made a subsidiary fact finding to support the finding of no contributory negligence.

REPLY POINT I. (Restated)

In answer to QUESTION PRESENTED NUMBER ONE OF PETITIONER Respondent says that the Trial Court did not find a "near violation" but found an actual violation of the Safety and Health Regulations for Longshoring.

In Appendix A hereof, pages 6 and 7, the Conclusion of Law Number 3 of the District Court was:

> 3. The SS LIPSCOMB LYKES, at the time of Plaintiff's accident, was unseaworthy and not reasonably fit for its intended use, because of the failure to have a safety net or other similar device at the cargo bulkhead. There was ample time for a net to be provided and plaintiff at the time of his injury *was working at such a height* and location as to require a net or other device." 29 C.F.R. 1918(b) provides:
>
> > "When an edge of a hatch section or of stowed cargo *more than 8 feet high is so exposed . . .*" (Emphasis supplied)

REPLY POINT II. (Restated)

In answer QUESTION PRESENTED NUMBER TWO OF PETITIONER, the Respondent says that the Trial Court made a subsidiary fact finding to support the finding of no contributory negligence.

In APPENDIX A hereof, pages 5 and 6, the Trial Court found in Findings of Fact Number 5:

> "5. About 3:00 p.m., Mr. Brown and the other longshoremen were unloading a sling load of bales which would nearly complete the fifty layer of bales. As they lifted the ends of the bales the winch began to pull the sling from beneath the bales. The sling caught on some obstruction and became taut, causing the bales to shift and knocking Mr. Brown off the cotton and down into the hold of the vessel causing the injury to his back here complained of."

Consequently, the Court was correct in concluding that Mr. Brown's placing himself in this position in executing the duties of his employment was not a failure on his part to exercise ordinary care for his own safety and consequently, that he was not guilty of contributory negligence. See Burrage v. Flota Mercante Grancolombiana, S.A., 431 F.2d 1229 (5th Cir. 1970).

29 C.F.R. 1918.32(b) requires that: ". . . a safety net of adequate strength to prevent injury to a falling employee . . ." and had the Petitioner provided such a net, the injury to Respondent could not have happened because the safety net would have prevented him from falling. See Weeks v. Alonzo Cothron, Inc., 466 F.2d 578 (5th Cir. 1972). Thus, the Trial Court concluded, rightly, that Respondent was not guilty of contributory negligence.

CONCLUSION

Because there was a clear violation of the Health Regulations and a subsidiary fact finding to bar contributory negligence on the part of Respondent, the Petition

for Writ of Certiorari must be in all things denied and a judgment below affirmed and Respondent so prays.

Respectfully submitted,

ATREUS M. CLAY
5643 Turtle Creek
Houston, Texas 77017
Phone: 713/944-1790

Attorney in Charge for Respondent

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Answer to Petition for Writ of Certiorari has been served upon Mr. Gus Schill, Royston, Rayzor, Cook & Vickery, Suite 3710, One Shell Plaza, Houston, Texas 77002, Phone: 713-224-8380, on this the____day of December, 1973.

ATREUS M. CLAY

APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. F. BROWN, Plaintiff

versus

LYKES BROS. STEAMSHIP CO., INC., *In Personam,* and SS LIPSCOMB LYKES, *In Rem,* Defendants

C.A. No. 71-H-582

This is a longshoreman's action for personal injuries. The case was tried on the question of liability only before the Court sitting without a jury on December 12, 1972, and taken under submission. The Court after considering the testimony, exhibits, and arguments of counsel, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The plaintiff, Mr. M. F. Brown, was employed as a longshoreman aboard the SS LIPSCOMB LYKES which is owned and operated by the defendant, Lykes Bros. Steamship Co. Inc. On April 17, 1971, the vessel was moored in the Port of Houston and was taking aboard approximately 450 bales of compressed cotton. Mr. Brown was working in the number 1 lower hold stowing the cotton.

2. The cotton was in bales which measured approximately 2 feet by 2 feet by 5 feet. It was being loaded by means of a rope sling which held three bales to a load.

3. When Mr. Brown and the rest of the gang reported for work at 1:00 p.m. they found that there were several large wooden crates in the number one hold, forward end. The stowage plan indicated that these had a combined weight of several tons and some were at least six feet tall. The cotton was to be loaded around these crates in the forward half of the number one hold. The crates were to help form a bulkhead midway in the hold which would allow room for other cargo in the after end of the hold.

4. Loading of cotton at the Port of Houston is paid for on a piecework basis rather than an hourly rate. The testimony indicated that the longshoremen worked very efficiently when loading under this plan of compensation. As the cotton is loaded the longshoremen attempt to keep as level a working floor as possible. The bales are first placed in the wings and bow and then in the hatch opening. When placing the bales in the wings and bow, the sling is unhooked and the bales are rolled off the sling. When the bales are to be placed in the hatch opening one end of the sling is unhooked and the longshoremen lift the ends of the bales to allow the winch to pull the sling from beneath the bales since there is little room to roll the bales off the sling in this location.

5. About 3:00 p.m. Mr. Brown and the other longshoremen were unloading a sling load of bales which would nearly complete the fifth layer of bales. As they lifted the ends of the bales the winch began to pull the sling from under the bales. The sling caught on some obstruction and became taut, causing the bales to shift

and knocking Mr. Brown off the cotton and down into the hold of the vessel causing the injury to his back here complained of.

6. Because of the height of the bulkhead, Mr. Brown was unable to climb up the bulkhead of cotton and crates and thus went up the stairs to the side. He reported his injury to the timekeeper and then, along with the rest of the gang in the hold, changed jobs and went to work dockside. The loading was finished at 4:45 p.m.

7. There was no safety net or rope ever placed at the bulkhead. The walking foreman indicated that a rope or net is put up when the longshoremen are working around a similar bulkhead of eight feet or more of general cargo but when cotton is being loaded, he stated it was up to the longshoremen to request a net. Evidently this is a result of the desire for speed in the loading of cotton encouraged by the piecework method of payment.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. 1333.

2. The Plaintiff is entitled to a seaworthy vessel since he was a longshoreman employed by the owners of the vessel and in the process of loading cargo. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); *Reed v. SS YAKA,* 373 U.S. 410 (1963).

3. The SS LIPSCOMB LYKES, at the time of plaintiff's accident, was unseaworthy and not reasonably fit for its intended use, because of the failure to have a safety net or other similar device at the cargo bulkhead. There was ample time for a net to be provided and plain-

tiff at the time of his injury was working at such a height and location as to require a net or other device. 29 C.F.R. 1918(b) provides:

> When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee or by other means providing equal protection under the existing circumstances.

The failure to comply with the Safety and Health Regulations for Longshoring may constitute an unseaworthy condition. *Manning v. MV "SEAROAD,"* 417 F.2d 603 (5 Cir. 1969).

4. The unseaworthy condition of the vessel is the sole proximate cause of the injury and there was no contributory negligence on the part of the plaintiff in mitigation.

It is therefore ORDERED, ADJUDGED and DECREED that the Court determines liability in this case consistent with the above Findings of Fact and Conclusions of Law and if damages cannot be stipulated between counsel within thirty (30) days from date of this order, the case will be set for a determination of damages.

Costs to be paid by the defendant.

DONE THIS the 2nd day of January, 1973.

/s/DANIEL H. THOMAS
United States District Judge